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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re M.E. et al., Persons Coming Under  
the Juvenile Court Law.

B204406

(Los Angeles County  
Super. Ct. No. CK51519)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.E.,

Defendant and Appellant.

Appeal from orders of the Superior Court of Los Angeles County,  
Marilyn Mackel, Commissioner. Affirmed.

Mark Turner for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County  
Counsel, and Judith A. Luby, Principal Deputy County Counsel, for Plaintiff and  
Respondent.

R.E. (Father), the father of minors M.E. and R.E., appeals from the juvenile court orders sustaining a petition under Welfare and Institutions Code section 300, subdivisions (b) and (g). Because his minor children M.E. and R.E. were subject to substantial risk from Father's domestic abuse of Mother, and because Father was in state prison at the time of the hearing for domestic abuse of another woman, we affirm the orders of the juvenile court.

## FACTS

On August 2007, Mother gave birth to M.E.'s and R.E.'s half-sibling A. The baby was premature and tested positive for amphetamine. Mother had a history of drug abuse and drug convictions, and M.E. and two of her half-sisters had been detained in a previous dependency case. On August 29, 2007, M.E., then six, and R.E., then three, were taken into protective custody and placed in the home of their maternal grandmother. Their newborn half-brother A. and their half-sisters B. and K. also were placed in protective custody.

On August 30, 2007, the Department of Children and Family Services (DCFS) filed a petition under Welfare and Institutions Code section 300.<sup>1</sup> Mother had told DCFS that Father was in prison, without further information. At the detention hearing on October 16, 2007, the court determined Father was in state prison in Lancaster, and found him to be the presumed father of M.E. and R.E.

An amended petition, filed October 16, 2007, alleged that Father had violated section 300, subdivision (b). The petition stated that during his eight-year relationship with Mother, Father had hit her in the presence of the children, had failed to complete a domestic violence program ordered in juvenile court, and had not successfully reunited with M.E. after the earlier dependency case. Father was presently incarcerated. The petition also alleged that Father had violated section 300, subdivision (g), because he made no provision for M.E.'s and R.E.'s basic necessities. The petition alleged that all

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<sup>1</sup> All future statutory references are to the Welfare and Institutions Code.

these acts endangered the children's physical and emotional health, created a detrimental home environment, and placed the children at risk.

The amended petition reported that the oldest half-sibling, B., stated that she had seen Father hit Mother a couple of times. M.E. stated "my dad hits my mom . . . they put their hands on each other a lot. He locks her up in the house and don't let her go out[.] He hits my mom in the car[.] At home, he closes the door, and hits my mom." Mother agreed that Father was violent; she left him when she became tired of "him hitting me and when he damaged my car." She tried not to let the children see him hit her, and would close the door. When they lived with Father's grandmother, she made about five domestic violence police reports. The maternal great-grandmother with whom M.E. and R.E. were placed stated that Father was "brutal with her" (Mother), and that the police once called her to tell her that Father had choked Mother until she passed out.

Father was present in custody at the hearing on October 16, 2007, and the court ordered a supplemental report so that DCFS could interview Father. The report of the interview stated that Father said he never hit Mother in the presence of the children; in fact, he never hit Mother, they just argued. The domestic violence class ordered for him in criminal court was in regard to his ex-girlfriend. Although he tried to help Mother by giving her what he could to care for R.E., he rarely could contribute anything because he was on parole and was unable to get jobs. When he could he gave Mother money for milk and diapers for R.E. and did what he could for M.E., who was his little girl and whom he loved.

On December 3, 2007, the court held the jurisdiction and disposition hearing. Father was represented by counsel, although he could not attend. His counsel argued that Father had provided for the children to the extent that he could, and had been incarcerated much of the time. Counsel also argued that it was Mother's fault that the children had been removed, and that Father and Mother had not been involved for more than three years. The domestic abuse was disputed "old history," unfair to Father who "had nothing to do with why the petition was filed." Father was set for release in two months and then would have to attend domestic violence classes having to do with an offense against

someone else six years ago, “but it has nothing to do with this mother. It’s unfair to sustain a petition against him when he was incarcerated at the time, didn’t have anything to do with this. [¶] [I]t’s remote.” Counsel for DCFS argued that the past acts of “chronic domestic violence” in Father’s and Mother’s relationship and his current incarceration for domestic violence constituted a risk to the children, although the Department was offering Father reunification services.

The court concluded that the allegations of past domestic violence were “old” but presented a risk to the children. Father’s current incarceration meant he was not available to care for the children and that “when you do things that get you locked up, that is child abuse. . . . You are missing in action from your child’s life. That is negligent.” The court sustained the first amended petition under section 300, subdivisions (b) and (g), and ordered Father to participate in parent education, domestic counseling, and individual counseling to address case issues. Father was granted monitored visitation.

Father appeals, arguing that the findings under section 300, subdivisions (b) and (g) were not supported by substantial evidence.

### **I. Substantial evidence supports the finding of substantial danger to M.E. and R.E.**

The court found substantial risk of harm to the physical and/or emotional health of M.E. and R.E. based on the evidence of past domestic violence, under section 300, subdivision (b). “[D]omestic violence in the same household where children are living is neglect; it is a failure to protect [M.E. and R.E.] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect *causes* the risk.” (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194.)

There was substantial evidence of continual physical violence by Father against Mother. M.E. and R.E.’s oldest half-sister, B., had seen Father hit Mother several times. M.E. herself testified that Father hit Mother in the car, and in the house behind closed doors. The evidence that M.E.’s and R.E.’s half-sister had seen the violence, and that M.E. was aware of its chronic occurrence, supports the finding that M.E. and R.E. were at risk. (*Id.* at p. 195 [“secondary abuse” occurs to children who are affected by what goes

on around them]; see *In re Alysha S.* (1996) 51 Cal.App.4th 393, 398 [emotional trauma may result when father beats mother in child's presence].) Further, at the time of the hearing, Father was in prison for domestic violence against another woman. Father's domestic violence against another female companion was substantial evidence that the risk remained at the time of the hearing. (See *In re Heather A.*, *supra*, 52 Cal.App.4th at p. 194 ["evidence that [mother] was not the only wife he battered" is relevant, including pending domestic abuse charges].) In addition, Father had failed to complete a domestic violence program in the earlier dependency case.

The court did not need to resort to speculation to find a risk of future harm to M.E. and R.E. where Father had not addressed his domestic violence in the earlier dependency case, had abused another woman after separation from Mother, and was serving time in prison for that offense. Ample evidence supports the finding under section 300, subdivision (b).

## **II. Substantial evidence supports the finding of failure to provide for M.E. and R.E.**

The court found that Father had failed to provide the necessities of life for M.E. and R.E., under section 300, subdivision (g). "[S]ection 300, subdivision (g) applies when, at the time of the hearing, a parent has been incarcerated and does not know how to make, or is physically and mentally incapable of making, preparations for the care of his or her child.'" (*In re James C.* (2002) 104 Cal.App.4th 470, 484.) Father protests that incarceration alone is insufficient for a finding of failure to provide. In this case, however, there was evidence that even when Father was not incarcerated he was on parole, unable to find work, and only rarely contributed to the support of M.E. and R.E. There was substantial evidence to support the finding under section 300, subdivision (g).

## **DISPOSITION**

The December 3, 2007 jurisdictional and dispositional orders are affirmed.

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WEISBERG, J.\*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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\*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.